Supreme Court, U.S.
FILED
981887 FEB 23 1999
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No. _____

In The

Supreme Court of the United States

October Term, 1998

GREGORY JAMES CATON,

Petitioner,

vs.

KEVIN TRUDEAU,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

SUPPLEMENTAL APPENDIX

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

GREGORY JAMES CATON	:	CIVIL ACTION NO. 97-2271
VERSUS	:	JUDGE TRIMBLE
KEVIN MARK TRUDEAU	:	MAGISTRATE JUDGE WILSON

APPEAL FROM THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF LOUISIANA, LAKE CHARLES DIVISION

IN RE:	:	CASE NO. 96BK-21110-C7
GREGORY JAMES CATON	:	WBC 97-2015
	:	JUDGE GERALD H. SCHIFF

OPINION

(Filed Febr. 11, 1998)

Before the Court now is the Debtor's appeal from the Bankruptcy Court's grant of summary judgment in favor of the Appellee, one of the creditors in the Debtor's Chapter 7 proceeding. After due consideration of the applicable law and facts, the Court hereby AFFIRMS the Bankruptcy Court's grant of summary judgment.

I. Background

In January 1996, the Creditor/Appellee (hereinafter "Creditor"), Kevin Trudeau, filed suit against the Debtor in the Circuit Court of Cook County, Illinois. The Creditor

alleged that, in a book and on an Internet website, the Debtor had continuously libeled him "maliciously and intentionally with full knowledge of [the statements'] truth or falsity or in complete and reckless disregard of their truth or falsity." The Debtor removed the suit to federal district court. The Creditor, however, promptly won a Motion to Remand his action to state court. Thereafter, although the Debtor does not contest that he had full and complete knowledge of the Creditor's suit and its remand, the Debtor did not file any response to the Creditor's claims.

On May 15, 1996, the Illinois Court held the Debtor to be in default and set the matter to be heard in an evidentiary "prove-up" hearing. The Debtor does not contest that he received notice of the default order and the pending prove-up hearing. Nonetheless, the Debtor neither appealed the default order nor appeared at the prove-up hearings. On June 5, 1996, after the Creditor appeared at the prove-up hearing to testify as to the merits of his claims, Judge Phillip A. Fleischman of Cook County, Illinois, rendered a ten million dollar judgment against the Debtor.

The Debtor filed for relief under Chapter 7 of the Bankruptcy Code on November 20, 1996. In response to the Debtor's bankruptcy action, the Creditor first filed a complaint with the Bankruptcy Court, seeking to have the libel judgment against the Debtor declared a non-dischargeable debt under 11 U.S.C. 523(a)(6). The Creditor next filed a Motion for Summary Judgment with the Bankruptcy Court, alleging that, based on the principles of collateral estoppel, the Creditor's judgment for libel *per se* established that there was no genuine issue of fact

regarding the "willful and malicious" nature of the Debtor's libel of Trudeau. In turn, the Debtor, arguing that the Bankruptcy Court was not so estopped, requested that the Bankruptcy Court conduct a separate "mini-trial" regarding the issue of willful and malicious conduct. The Bankruptcy Court, however, granted summary judgment to the effect that (1) the Creditor's default judgment collaterally estopped the Bankruptcy Court from considering whether the Debtor's libel was "willful and malicious" and that, therefore, (2) the Creditor's libel judgment was nondischargeable.

II. Standard of Review

Because this action concerns an appeal from a final order of the Bankruptcy Court in a matter determined to be a core proceeding under 28 U.S.C. 157(b)(3), this Court exercises its appellate jurisdiction pursuant to 28 U.S.C. 158(a)(1). Therefore, in accordance with Bankruptcy Rule 8013, all fact findings of the Bankruptcy Court are to be accorded due weight and shall not be set aside unless the Court determines those fact findings to be clearly erroneous. In other words, this Court's "review of a bankruptcy court's decision is governed by the same standards of review employed by the Fifth Circuit when reviewing a district court's judgment. ***A bankruptcy court's conclusions of law are subject to plenary review on appeal*** and the findings of fact are adopted unless clearly erroneous." *Cottonport Bank v. Dichiara,* 193 B.R. 798, 800 (W.D. La. 1996) (emphasis added).

III. Court's Findings

A. Parties' Arguments

The Debtor claims that the Bankruptcy Court arrived at an erroneous conclusion of law when it held that the Creditor's default judgment precluded a hearing to present evidence on whether the Debtor's conduct in libeling the Creditor was "willful and malicious." The Debtor avers that an Illinois default judgment may not be afforded collateral estoppel effect in bankruptcy proceedings because the issue of "willful and malicious" conduct has not been "actually litigated." In support, the Debtor proffers numerous decisions by bankruptcy courts in Illinois and other states to the effect that, in the circumstances before the court, Illinois default judgments did not have collateral estoppel effect. Alternatively, the Debtor argues that, although an Illinois default judgment may, in some circumstances, be entitled to collateral estoppel effect, the Creditor did not meet the burden of proof necessary for a summary judgment as to dischargeability because the Creditor did not prevent sufficient evidence of the charges litigated in the Illinois state court's prove-up hearing.

In support of the Bankruptcy Court's decision, the Creditor avers that under Illinois state law on collateral estoppel the proper inquiry is not simply whether the issue of "willful and malicious" has been "actually litigated" but rather whether the Debtor was afforded a "full and fair opportunity" to litigate the issue. In support, the Creditor indicates various Illinois state court decisions. Additionally, the Creditor avers that those federal decisions upon which the Debtor relies are distinguishable

from the case at bar because: (1) many of the bankruptcy courts only nominally relied on Illinois state law, as they were required to do, and relied instead on the federal common law of collateral estoppel; and (2) those bankruptcy courts which concluded that, based on actual Illinois state law, an Illinois default judgment was not due collateral estoppel effect limited the scope of their decisions to the facts before them. As an alternative ground to affirm the Bankruptcy Curt's decision, the Creditor alleges that the Debtor has failed to adhere to the rules of appellate procedure and that, therefore, the Debtor's appeal should be dismissed.

B. Bankruptcy Court's Decision

In deciding whether a state court judgment has collateral estoppel effect in bankruptcy court, the court must "refer to the preclusion law of the state in which [the] judgment was rendered" and not to general federal common law notions of collateral estoppel. *In re Garner*, 56 F.3d 677, 679 (5th Cir. 1995). Accordingly, in evaluating the particular circumstances of the default judgment that the Creditor in the case at bar obtained against the Debtor, the Bankruptcy Court relied on a recent case from the Illinois supreme Court, *Talarico v. Dunlap*, 1997 WL 56199 (Ill. 1997). In particular, the Bankruptcy Court quoted the following language from the *Talarico* decision regarding collateral estoppel:

> For collateral estoppel to apply, a decision on the issue must have been necessary for the judgment in the first litigation, and the person to be bound must have actually litigated the issue in

> the first suit . . . In deciding whether the doctrine of collateral estoppel is applicable in a particular situation, a court must balance the need to limit litigation against the right of a fair adversary proceeding in which a party may fully present his case. In some circumstances the absence of an incentive to vigorously litigate in the former proceeding is relevant in the application of collateral estoppel. There must have been the incentive and opportunity to litigate, so that a failure to litigate the issue is in fact a concession on that issue. Incentive to litigate might be absent, for instance, where the amount at stake in the first litigation was insignificant, or if the future litigation was not foreseeable. *Talarico,* 1997 WL 56199 (citations omitted).

The Bankruptcy Court next analyzed the Creditor's claim of collateral estoppel in light of the *Talarico* decision:

> Clearly, the second and third elements of collateral estoppel are present, (1) the Illinois proceeding resulted in a final judgment, and (ii) the Debtor was a party to such proceeding. The issue which this court must determine is whether the issues decided in the Illinois proceeding are identical with the section 523 issues presented here. And, as suggested by the court in *Talarico,* did the Debtor have a "full and fair opportunity to litigate" such issues in Illinois? *Ibid.* Was there "the incentive and opportunity to litigate so that a failure to litigate the issue is in fact a concession on that issue."? *Ibid.*

In addressing whether the Debtor in this case had the "incentive and opportunity to litigate," the Bankruptcy Court concluded that:

> The complaint filed against Defendant in Illinois alleged libel *per se* and requested damages of $15,000,000. One could hardly be heard to claim that Defendant did not have the incentive to litigate the issues presented. A claim for libel *per se* with damages in the millions is not the type of trivial claim referred to in *Talarico* where a party might not feel the incentive to challenge the allegations.

In addressing whether the issue decided in the Illinois default judgment are identical with the requirements of section 523 of the Bankruptcy Code, the Bankruptcy Court first referenced *Boyce v. Greenway*, 71 F.3d 1177, 1181 (5th Cir. 1996), in which the fifth circuit held that " 'willful and malicious' under sec. 523(a)(6) of the Bankruptcy Code [means] 'intentional' and lacking 'just cause or excuse.' "

The Bankruptcy Court then found that:

> Conduct deemed libel *per se*, which requires a finding of actual malice, equates to willful and malicious under section 523(a)(6) within the definition [of Boyce]. Thus, the debt owed to Trudeau under the Illinois Judgment is non-dischargeable pursuant to section 523(a)(6).

C. Court's De Novo Consideration

After an extensive review of the record and the cases proffered by both the Debtor and Creditor, the Court finds itself in full agreement with the Bankruptcy Court's determination that the Creditor's default judgment precludes any further consideration of whether the Debtor's

libelous conduct was "willful and malicious" under section 526.

The Court first notes that, under the standard enunciated in *Talarico v. Dunlap*, 1997 WL 56199 (Ill. 1997), the case at bar affords an appropriate opportunity to "balance the need to limit litigation against the right of a fair adversary proceeding in which a party may fully present his case." In balancing these interests, the Court notes that, on the Debtor's side of the scale, there is absolutely no indication in the record that the Debtor was in any way deprived of the right to a "fair adversary proceeding" in Illinois state court. Rather, the very fact of the Debtor's attempted removal of the Creditor's action to federal court makes it apparent that the Debtor had full knowledge of the content, allegations, and course of the proceedings against him in Illinois. Nonetheless, instead of exercising his "right to a fair adversary proceeding," the Debtor chose to simply ignore the Creditor's suit after it was remanded to state court. On the other side of the scale, it is clear to the Court that to allow the Debtor to have a second opportunity to litigate the willful and malicious character of his libelous conduct in Bankruptcy Court would undercut the need to "limit litigation" which the *Talarico* decision emphasizes.

The Court next notes that, under the second and third considerations of *Talarico*, the Debtor in this case had considerable "incentive" to defend himself against the Creditor's claims in Illinois and every imaginable "opportunity" in which to do so. As for "incentive," the Debtor has exhibited such virulence in (1) publishing his views of the Creditor in print and on the Internet both before and after the Creditor's succesful [sic] judgment,

and in (2) asserting the alleged truth of those views to this Court, that it is clear that the Debtor had an "incentive" to defend his virulent beliefs before the Illinois trial court. Additionally, as the Bankruptcy Court noted, a petition requesting fifteen million dollars in damages for libelling a nationally known figure such as the Creditor provided the Debtor with considerable incentive to defend himself. As for fair "opportunity" to defend himself, by the Court's count, the Debtor was afforded at least five such opportunities: the first was upon the initial filing of the Creditor's state action; the second opportunity was upon the Debtor's removal of the action to federal court; the third was upon the subsequent remand to state court; the fourth opportunity was upon the Creditor's filing of his initial petition for default judgment; and, the fifth was upon the preliminary entrance of the order of default.[1]

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[1] In his Reply Brief, the Debtor appears to imply that he was deprived of an adequate opportunity to defend himself because, after the preliminary notice of default judgment was entered, the Debtor was not afforded additional notice of the actual date of the prove-up hearing. The Court first notes that the date of the prove-up hearing is plainly stated on the face of the preliminary default order. In the event that the Debtor received a copy of the Illinois court's preliminary default order, he clearly had notice of the date of the prove-up hearing, albeit not notice independent of the default order itself. However, in the event that the Debtor never received a copy of the preliminary default order, the Court finds that the Debtor, after engaging in his failed removal to federal court, then receiving a copy of the Creditor's motion for default judgment, was clearly put on inquiry notice as to the institution of a default action. Pursuant to this notice, the Debtor had an obligation to inquire as to the date and time of the prove-up hearing, which

The Court next notes that the Creditor, in his original petition, specifically alleged that the Debtor was guilty of "maliciously and intentionally" committing libel *per se*. The Illinois state court later granted the Creditor judgment based on his petition, although the court only afforded the Creditor ten million dollars in damages, as opposed to the requested fifteen million dollars. In light of the plain language of both the Creditor's complaint and the trial court's default judgment, the Court is certain that the issues decided in the Illinois action are identical to the standard for "willful and malicious" conduct under section 562, especially in light of the Fifth Circuit's decision in *Boyce v. Greenway*, 71 F.3d 1177, 1181 (5th Cir. 1996).

The Court additionally notes that nearly all of the federal decisions which the Debtor cites for the proposition that no Illinois default judgment may have collateral estoppel effect do not refer to any Illinois state law on collateral estoppel whatsoever but rather rely on strictly federal decisions applying collateral estoppel. See *In re: Dempster*, 182 B.R. 790 (N.D. Ill. 1995); *In re: McGuffey*, 145 B.R. 582 (N.D. Ill. 1992); *In re: Dvorak*, 118 B.R. 619 (N.D. Ill. 1990); *In re: Martinez*, 110 B.R. 353 (N.D. Ill. 1990); *Klingman v. Levinson*, 831 F.2d 1292 (7th Cir. 1987), *In re: Herwig*, 77 B.R. 662 (S.D. Ill. 1987); *In re McKenna*, 4 B.R. 160 (N.D. Ill. 1980).[2] The Court does not doubt that,

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information the Illinois court would have afforded the Debtor had he made the least effort to obtain it.

[2] Of the cases which the Debtor cites, the sole case even purporting to rely on strictly Illinois state decisions is *Asbury v. Meyer*, 195 B.R. 412 (E.D. Mo. 1996). Indeed, the court in *Asbury*

under many courts' more liberal federal standards regarding the effects of collateral estoppel, an Illinois default judgment does not preclude a Bankruptcy Court from conducting an inquiry into the willful and malicious quality of a defendant's conduct. However, because of the standard articulated by the Fifth Circuit in *In re Garner*, this Court is not free to apply such "liberal federal standards" of collateral estoppel, but, instead, must respect the decisions of the Illinois Supreme Court with regard to

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recognized the very tendency of federal courts to "***gloss[ ] over this distinction between federal collateral estoppel and state law collateral estoppel***" that this Court finds apparent in the Debtor's cited cases from Illinois bankruptcy courts. *Id.* at 414 (emphasis added). The confusion that the *Asbury* court highlights on the part of federal bankruptcy courts is apparently also shared by the Debtor, who avers that "the difference between Illinois collateral estoppel law and Federal collateral estoppel law is irrelevant."

In *Asbury*, the Bankruptcy Court concluded that the Creditor's default judgment in a personal injury action did not have collateral estoppel effect. *Id.* at 416. However, the court also found that "the default judgment in the **present case** does not satisfy the "actually litigated" requirement of collateral estoppel," thereby expressly limiting the court's holding to the facts before it. *Id.* at 415 (emphasis added). This Court does not, therefore, find *Asbury* to be relevant authority inasmuch as the court in that case expressly declined to hold that Illinois default judgments were, as a matter of law, never entitled to collateral estoppel effect, as the Debtor would have this Court decide. The Court also notes that *Asbury* was decided before the Illinois Supreme Court set out its standard for collateral estoppel effect in *Talarico*, upon which standard the Bankruptcy Court in the instant case and this Court rely. *Talarico*, 1997 WL 56199 (Ill. 1997).

its state's own law on collateral estoppel.[3] See *In re Garner*, 56 F.3d 677, 679 (5th Cir. 1995). And, the Court believes that, in applying the considerations set out by the Illinois Supreme Court in *Talarico*, the Bankruptcy Court in this case reached the correct decision, namely that the Bankruptcy Court, and any federal court for that matter, is barred from second-guessing the judgment of the Illinois state court with regard to the willful and malicious character of the libel *per se* which the Debtor committed against the Creditor. See *Talarico v. Dunlap*, 1997 WL 56199 (Ill. 1997).

The Court next addresses the Debtor's argument in the alternative that the Bankruptcy Court committed error in granting the Creditor summary judgment without sufficient evidence from the Illinois state court that the issues for which the Creditor received default judgment were "actually litigated." See *Matter of Shuler*, 722 F.2d 1253 (1984). The Court first questions whether this question is distinct from this Court's prior determination that, under Illinois state law, the "actually litigated" prong of collateral estoppel is effectively satisfied by the Debtor in this case having had (1) considerable incentive to litigate in Illinois state court, (2) numerous opportunities to litigate in Illinois state court, and thus (3) a full and fair opportunity to litigate in Illinois state court. However, to the extent that the Debtor's second point of

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[3] The Court further notes that each of the federal decisions which the Debtor cites as denying collateral estoppel effect to Illinois default judgments was decided before *Talarico v. Dunlap*, 1997 WL 56199 (Ill. 1997). It is therefore questionable whether the holdings in these cases are still viable.

appeal is distinguishable from his first, this Court finds that the Creditor has presented sufficiently detailed evidence from the Illinois state court to merit summary judgment. In particular, the Court indicates the Illinois state court's explicit finding that, only after having been "fully advised in the premises" and having "heard the testimony of the plaintiff," was the Creditor awarded judgment for libel *per se*.[4]

In sum, after a *de novo* review of the Bankruptcy Court's decision, and in light of the Illinois state law regarding collateral estoppel, the Court finds that the Bankruptcy Court was correct in its finding that the Creditor's judgment against the Debtor was not dischargeable. The decision of the Bankruptcy Court to grant summary judgment in favor of the Creditor is therefore AFFIRMED.

/s/ James T. Trimble, Jr.
JAMES T. TRIMBLE, JR.
UNITED STATES
DISTRICT JUDGE

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[4] Because the Court has decided to affirm the Bankruptcy Court's decision based on the Creditor's substantive arguments, the Court need not reach the Creditor's alternative argument that the Bankruptcy Court decision should be affirmed because the Debtor has failed to follow proper procedure for appeal.